

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

JOSE BAUTA, :  
Plaintiff, : 14-CV-03725 (RER)  
v. :  
225 Cadman Plaza  
GREYHOUND LINES, INC., et al., : Brooklyn, New York  
Defendants. : May 29, 2019

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE  
BEFORE THE HONORABLE RAMON E. REYES, JR.  
UNITED STATES MAGISTRATE JUDGE

#### APPEARANCES:

For the Plaintiff: RAYMOND D. McELFISH, ESQ.  
McElfish & Associates, LLC  
60 East 42nd Street  
Suite #2100  
New York, New York 10168

For Greyhound Lines,  
Inc.; Sabrina  
Anderson: BRADLEY JAMES BARMEN, ESQ.  
Lewis Brisbois Bisgaard &  
Smith, LLP  
1375 East 9th Street  
Suite #1600  
Cleveland, Ohio 44114

STEVEN SAAL, ESQ.  
Marshall Dennehey Warner  
Coleman & Goggin  
800 Westchester Avenue  
Suite #C-700  
Rye Brook, New York 10573

Court Transcriber: SHARI RIEMER, CET-805  
TypeWrite Word Processing Service  
211 N. Milton Road  
Saratoga Springs, New York 12866

(Appearances continued on next page.)

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3 APPEARANCES (CONTINUED) :

4 For Greyhound Lines, JONATHAN SHAUB, ESQ.  
Inc.; Sabrina  
5 Anderson: Shaub, Ahmety, Citrin & Spratt, LLP  
77 Water Street, Suite 702  
New York, New York 10005

6

ROBERT ORTIZ, ESQ.  
Shaub, Ahmety, Citrin & Spratt, LLP  
1983 Marcus Avenue, Suite 260  
Lake Success, New York 11042

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1 (Proceedings began at 4:59 p.m.)

2 THE COURT: Good afternoon. This is Magistrate  
3 Judge Reyes. We are holding a telephone conference in the  
4 case of Bauta v. Greyhound, et al., docket number 14-CV-32725,  
5 excuse me, 3725.

6 Counsel for the plaintiff, please state your name  
7 for the record.

8 MR. McELFISH: Raymond McElfish for the plaintiff.  
9 Good afternoon, Judge.

10 THE COURT: Good afternoon. Counsel for the  
11 defendants, starting with Mr. Barmen.

12 MR. BARMEN: Brad Barmen. Brad Barmen, Your Honor,  
13 for Greyhound and Sabrina Anderson. How are you?

14 THE COURT: Good. Who else is on the line?

15 MR. SHAUB: Jonathan Shaub for the Greyhound  
16 defendants. Good afternoon, Your Honor.

17 MR. ORTIZ: Robert Ortiz for Greyhound and Sabrina  
18 Anderson. Thank you, Your Honor.

19 MR. SAAL: Steven Saal for Greyhound and Sabrina  
20 Anderson. Good evening, Your Honor.

21 THE COURT: Good evening. Anyone else?

22 Okay. All right. I wanted to talk to you about  
23 Greyhound's pre-motion letter, it's Docket No. 752, and the  
24 concern I have as far as scheduling. So I think this -- you  
25 know, I'm going to be very frank. I think this presents an

1 interesting issue that I'm not sure how it gets resolved.

2           But I'm concerned that it should be resolved prior  
3 to continuing the proceedings on the pain and suffering past  
4 and future because even if Greyhound is right that we would  
5 have to have a, as Mr. McElfish just pointed out in his  
6 opposition letter, we would have to have a trial on punitive  
7 damages for Greyhound as opposed to Ms. Anderson because if  
8 collateral estoppel doesn't apply to the jury's verdict  
9 against Greyhound on punitive damages, then Mr. Bauta would be  
10 entitled to try that issue because Greyhound couldn't hold the  
11 Pennsylvania and Philadelphia actions or the Pennsylvania  
12 actions against Mr. Bauta because he wasn't part of that.

13           MR. SHAUB: Your Honor, it's Jonathan Shaub. I have  
14 a couple of thoughts on this that I think goes directly to  
15 that issue. I think at this point there is a judicial  
16 estoppel. Mr. Bauta was well aware of this risk of what would  
17 happen if we proceeded with trial before a resolution of the  
18 appeals in Pennsylvania. He was given multiple opportunities  
19 to avoid this exact situation by the Court, and he read the  
20 brief. And his option was to try the case, agree to a stay,  
21 or accept collateral estoppel. He decided to proceed down the  
22 collateral estoppel path. And at this point, he can't discard  
23 the Pennsylvania verdict simply because it came out poorly for  
24 him. He's judicially estopped. He is in privity with those  
25 plaintiffs having decided to avail himself of the Pennsylvania

1 verdict.

2 So it's our position that the dismissal by the -- or  
3 the Pennsylvania court's termination that there's no basis for  
4 independent liability precludes Mr. Bauta from litigating that  
5 very issue in this [indiscernible].

6 THE COURT: Well, that brings a couple of questions  
7 -- issues into question. So why don't we take a step back.  
8 Why don't you explain to me how this decision which did not  
9 alter the judgment changes the determination on collateral  
10 estoppel as to Greyhound on punitive damages?

11 MR. SHAUB: Mr. McElfish's theory of the case if you  
12 look at his complaint on through his joint pretrial order and  
13 looking at his motion for collateral estoppel and reading the  
14 charge in this case and the verdict form in this case was  
15 based on a theory that Greyhound was independently liable for  
16 punitive damages. His entire case, as you'll remember, was  
17 the G-40 issue and the failure to enforce the 150-mile rule.  
18 And that's all --

19 THE COURT: That is not true. That is not true.  
20 His entire case was not that. It was also on the inadequacy  
21 of Greyhound's fatigue management program as a whole. There  
22 was expert testimony to that effect, and so --

23 MR. SHAUB: But you now have -- the Pennsylvania  
24 court has now determined based on the exact same evidence  
25 having considered based on this Court's decision that only the

1 evidence in Pennsylvania would be the evidence that was  
2 admissible and the decision would be based on in this case.  
3 The Pennsylvania appellate court viewed all of that evidence  
4 as the same evidence that came in in this case and said  
5 there's no independent basis for liability against Greyhound.  
6 The -- I'm sorry, Your Honor.

7 THE COURT: They only addressed the G-40 issue.

8 MR. SHAUB: I don't know that we can make that  
9 distinction here if the entire case -- the evidence in this  
10 case was exactly the evidence that was heard by the  
11 Pennsylvania jury. And that was the same evidence that was  
12 heard by this jury. And you have the Pennsylvania court now  
13 saying that that evidence in the Pennsylvania case which is  
14 the decision and the evidence that this collateral estoppel  
15 order was based on was insufficient to find liability.

16 THE COURT: Well, they said one aspect of the  
17 evidence, the G-40 evidence. They didn't talk -- there was no  
18 discussion in that decision of the fatigue management system  
19 as a whole, whether it was adequate or not. So I'm at a loss  
20 here because I see a written decision from an appellate court  
21 that is almost in short hand that I have no briefs, I have --  
22 I don't see what the arguments were -- made and whether they  
23 encompass everything.

24 So that's why I wanted to talk to you because I just  
25 don't know. I don't know.

1                   MR. SHAUB: But, Your Honor, i think we're slicing  
2 it a little too thinly. They reviewed the trial transcript,  
3 and they determined that there was no independent basis, that  
4 they listed every single ground --

5                   THE COURT: Well --

6                   MR. SHAUB: -- upon which independent liability was  
7 based. I'm not sure that's really relevant when they've  
8 determined that as a matter of law that there was no conscious  
9 disregard of a known risk.

10                  THE COURT: But they didn't -- still they didn't  
11 reverse the decision. They didn't reverse the judgment, and  
12 they could have. They could have said the judgment is  
13 reversed to the extent that Greyhound was found independently  
14 liable for punitive damages. However, it still remains  
15 vicariously liable for Anderson's conduct that was sufficient  
16 for punitive damages. And the dollar amount was the same. It  
17 was in one line. It's what are your punitive damages against  
18 Anderson and Greyhound. I think that's one of the reasons why  
19 we broke it out in our verdict form because we needed to know.

20                  MR. SHAUB: Right. And I think, Your Honor, you've  
21 hit a very interesting point. The Pennsylvania court didn't  
22 need to do that because it was a single line item. Here we do  
23 have those two line items, and here the charge was they're  
24 independent conduct. And I just -- if there's a Pennsylvania  
25 court saying there's in independent basis for liability, I

1 don't know that we read further into the decision. It is said  
2 there's no independent basis for liability. And that should  
3 be the end of the discussion here.

4 THE COURT: I don't -- but I don't know if that --  
5 if the argument about the fatigue management program was made  
6 to them or anything like that. They may have -- you may --  
7 Greyhound may have just argued G-40. In this case, that is  
8 only one part of Mr. McElfish's argument that he made to our  
9 jury and that apparently was made to the Pennsylvania juries,  
10 too.

11 MR. SHAUB: But I think that that --

12 THE COURT: Otherwise, I wouldn't have allowed it  
13 in.

14 MR. SHAUB: But that's exactly the issue. It was  
15 made to the Pennsylvania jury and the Court has now determined  
16 in Pennsylvania that there's no independent basis for  
17 liability for Greyhound. We have consciously coupled these  
18 two -- the evidence in these two cases together so I just  
19 don't know how we escape that. If there was -- all the  
20 evidence was considered by the Pennsylvania court --

21 THE COURT: No, wait, wait. The final sentence  
22 before -- I mean you're reading a whole lot, Mr. Shaub, into  
23 that decision because the final sentence before the conclusion  
24 says, "Accordingly, we need not and do not address whether the  
25 trial court erred in its rulings concerning Rule G-40 or

1 whether there was sufficient evidence to support an  
2 independent liability claim against Greyhound for its own  
3 actions as a company."

4 They didn't address that.

5 MR. SHAUB: Your Honor?

6 THE COURT: They didn't address that because it  
7 doesn't matter, there's vicarious liability. There was one  
8 verdict amount. Greyhound's stuck with that. That's what  
9 happened.

10 MR. SHAUB: I understand, Your Honor. But I think  
11 what they were saying there is that the G-40 policy as to the  
12 issue of negligence, not as to the issue of punitive damages,  
13 they're saying we're not going to address whether G-40 is a  
14 sufficient basis to find negligence. It doesn't say anything  
15 about the punitive damages in that last section.

16 MR. BARMEN: Your Honor, this is Brad Barmen. Would  
17 it benefit the Court if we provided you with all the briefing  
18 from the Pennsylvania appeal both Greyhound's and the  
19 plaintiff's?

20 THE COURT: The only way to resolve this issue fully  
21 and adequately is have full briefing on it with whatever  
22 exhibits or anything you think are based on the conversation  
23 we're having now is warranted, including -- I would say I need  
24 to see the briefs. I'd need to see the transcript of the oral  
25 argument. Was there an oral argument or was it just done on

1 paper?

2 MR. BARMEN: There was an oral argument, Your Honor.

3 THE COURT: All right. I would need to see -- I  
4 would need to see the entirety of it because I'm not sure it  
5 goes as far as Mr. Shaub claims it does. But the question --  
6 the reason why I made this call or wanted to have this pre-  
7 motion conference was, you know, something that I feared and  
8 I've said several times to you folks, you know, I don't want  
9 to have Bauta 3 and Bauta 4. I'd just like to have Bauta 2  
10 and be done with it.

11 So, we're going to run -- if we go forward on, what  
12 is it --

13 MR. BARMEN: The 10th.

14 THE COURT: -- the 10th on just past and future pain  
15 and suffering, the retrial of that, and we allow this  
16 briefing, which I'm going to allow because I think it's an  
17 important issue. I just don't know the answer to it. Maybe  
18 Greyhound's right and maybe they're wrong. If they're wrong  
19 -- if they're right, we have to have another trial because I  
20 don't think -- I'd like to hear more about this judicial  
21 estoppel, but I'm not sure it flies.

22 But if Greyhound -- even if Greyhound is right,  
23 there's going to be Bauta 3, I think. And then you're going  
24 to appeal from that and Bauta 2 because you're not going to be  
25 satisfied with that. And the Court of Appeals is going to --

1 may throw it all back for Bauta 4. So I guess this question  
2 goes to Mr. McElfish really. And you can answer any other  
3 questions you want to, Mr. McElfish. I understand that you're  
4 under difficult circumstances right now. I'm sorry to pull  
5 you away from it. But --

6 MR. McELFISH: Okay.

7 THE COURT: -- but if we go forward on the 10th and  
8 Greyhound convinces me they're right but they're wrong on  
9 judicial estoppel, you're going to be coming back to New York  
10 for Bauta 3. Is that something that you want?

11 MR. McELFISH: Well, what I want --

12 THE COURT: You know you want.

13 MR. McELFISH: What I want which is what I think any  
14 lawyer in my position should want is the most efficient proper  
15 resolution of this, whatever that means. So if you feel based  
16 on looking at the papers that you need more time to avoid not  
17 only a retrial in Bauta 2 on non-economic but a potential  
18 retrial in Bauta 3 on punitive damages, I think you -- I think  
19 it needs to wait because as badly as I want to move on with  
20 the trial, I'm not really -- I have to accept the fact that if  
21 I try the case on June 10th as it's currently positioned, I'm  
22 not really moving on with anything. I might feel like I'm  
23 moving on for a minute, but no one's moving on because this  
24 issue's hanging out there.

25 So if you would like to brief the issue and then

1 reset the trial for, you know, a couple of months from now or  
2 whatever, I think that's the right thing to do for the reasons  
3 you've given.

4 MR. BARMEN: And, Your Honor, this is Barmen. I'm  
5 admittedly the least intellectual of all the people on this  
6 call. But I don't understand how collateral estoppel can  
7 apply when it benefits the plaintiff but then not apply when  
8 it doesn't. I just -- I'm not wrapping my -- obviously, I'm  
9 missing something here. But if he's in privity enough for it  
10 to apply to his benefit, I don't understand how that same  
11 privity doesn't apply --

12 THE COURT: No, he doesn't have -- well, look, I  
13 haven't considered Mr. Shaub's argument of judicial estoppel  
14 and maybe you're arguing something else. But he doesn't have  
15 to be --

16 MR. BARMEN: But I agree with Mr. Mcelfish in that  
17 if this is going to be an issue, this potentially is going to  
18 lead to another trial if we go forward on June 10th. I  
19 certainly from my standpoint and that of my client, I am in  
20 agreement with Mr. McElfish that it's best -- if there's any  
21 question, it's best to wait so if we -- when we do it again,  
22 we only do it once unless ultimately a court of appeals makes  
23 us do it again.

24 MR. SHAUB: Your Honor, it's Mr. Shaub again, and  
25 just one other point. There has been a petition to the

1 Pennsylvania Supreme Court to review the punitive damages  
2 award, the decision as it relates to punitive damages award  
3 against Ms. Anderson in this case. And that raises another  
4 concern to this idea of judicial economy. The appeals process  
5 isn't necessarily done in this case yet either. So there is  
6 also a possibility of an adverse decision or a decision that  
7 gets rid of the punitive damages against Ms. Anderson in this  
8 case so then we can have Bauta 6 or 7 [indiscernible].

9 THE COURT: All right.

10 [Pause in proceedings.]

11 THE COURT: Okay. When -- so Greyhound appealed  
12 the Anderson punitive damages to the Pennsylvania Supreme  
13 Court?

14 MR. SHAUB: Your Honor, they [indiscernible],  
15 though. It's not an appeal as of right.

16 THE COURT: Oh, it's --

17 MR. SHAUB: So they [indiscernible].

18 THE COURT: It's similar to a New York Court of  
19 Appeals, okay.

20 MR. SHAUB: Correct. This is my understanding of  
21 it.

22 THE COURT: All right. When was that filed?

23 MR. SHAUB: Today, Your Honor.

24 THE COURT: And if leave is granted, then they have  
25 to have briefing and what we'll be here another -- you might

1 come back a year and a half, two years from now with a motion  
2 to set aside Anderson's punitive damage verdict?

3 MR. SHAUB: Potentially, yes, Your Honor. And I  
4 think that's why the federal court in Pennsylvania stayed that  
5 case when the last appeal was filed, and the Pennsylvania  
6 state court stayed the remaining case there for the same  
7 reason.

8 THE COURT: I got to say it's -- they're going to be  
9 hard pressed to reverse that verdict, though. I mean there  
10 was ample evidence against her that she drove tired.

11 MR. SHAUB: Well, yeah, but the Pennsylvania  
12 standard is so stringent for punitive damages and there's  
13 plenty of cases out there of drivers fell asleep at the wall.  
14 And that didn't rise to the level of punitive damages under  
15 Pennsylvania law.

16 THE COURT: Okay. If -- I'll decide by tomorrow  
17 because I know you probably want to change your plans and  
18 cancel your reservations if you can. I'll decide what I'm  
19 going to do by tomorrow. And if it is adjourned, I will give  
20 you a briefing schedule, and I will give you specific issues  
21 to brief because I am -- ultimately, one of the biggest issues  
22 is whether if Greyhound is correct, whether Mr. Bauta would be  
23 estopped from having Bauta 3 on punitive damages against  
24 Greyhound.

25 I just don't see it right now, but I haven't seen

15

1 the arguments laid out. So look for an order tomorrow. All  
2 right?

3 MR. SHAUB: Okay.

4 UNIDENTIFIED SPEAKER: Yes, Your Honor.

5 UNIDENTIFIED SPEAKER: Thank you.

6 MR. McELFISH: Judge?

7 THE COURT: Yeah.

8 MR. McELFISH: McElfish here. Are you planning on  
9 setting another trial date or anything like that as well  
10 because I would just like to be in front of my calendar if I  
11 do -- if you do.

12 THE COURT: Yes. I will likely not do that. In the  
13 order, I will just adjourn the trial, issue a briefing  
14 schedule, and give you an idea on the issues. And then later  
15 we'll figure out when to have the trial. Yes, when given all  
16 these other appeals and all that stuff that's floating around.

17 All right?

18 MR. McELFISH: Okay.

19 THE COURT: Thank you everyone.

20 ALL ATTORNEYS: Thank you, Your Honor.

21 (Proceedings concluded at 5:20 p.m.)

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1 I certify that the foregoing is a court transcript from  
2 an electronic sound recording of the proceedings in the above-  
3 entitled matter.



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6 Shari Riemer, CET-805  
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